

No. 02-70674

**APR 3 2003**

Paez, Circuit Judge, dissenting:

**CATHY A. CATTERSON  
U.S. COURT OF APPEALS**

Because Salguero-Castro established past persecution by the military on account of an imputed political opinion, I would reverse and remand for additional findings on changed country conditions.

I.

Neither the Immigration Judge (IJ) nor the Board of Immigration Appeals (BIA) made a negative credibility finding; therefore we must accept Salguero-Castro's testimony as true. *Lim v. INS*, 224 F.3d 929, 933 (9th Cir. 2000).

Salguero-Castro testified that after the guerillas ambushed soldiers on his father's land, an army officer approached Salguero-Castro and his father and demanded that they clear the brush in the area where the ambush occurred. After his father explained that Salguero-Castro would be responsible for the clearing, but that he would also need to help with the harvest, the army officer said that Salguero-Castro had to keep the area clear or he would take Salguero-Castro as a guerilla, "and you know very well what it is that we do to guerillas." Salguero-Castro testified that he knew this meant he would be killed "because it is known that every person that they take to be a guerilla they kill." Furthermore, after the officer's threat, Salguero-Castro and his father came upon a large hole filled with human remains in clothing that suggested they were the bodies of guerillas or

civilians.

Salguero-Castro testified that the guerillas approached him several times and forced him to attend meetings to encourage him to join their forces. A couple of days after a visit from the guerillas, Salguero-Castro was stopped at a check point by the guerillas and held for several hours. Again, Salguero-Castro refused to join them and proceeded to go into town to run an errand for his father. On his way home, he passed through the area where he had been held by the guerillas hours before and a military plane descended and started strafing his location.

A few days after the shooting incident, Salguero-Castro's mother told Salguero-Castro that an army officer came to the house looking for him, stating that "he [Salguero-Castro] was a guerilla and that he would kill him." Salguero-Castro then fled to the mountains and subsequently to the United States. He testified that he knows he is on an army list as a guerilla, and that if he returns he will be killed. Salguero-Castro also testified that his father had written him a letter telling him that the army had come back to the house looking for him.

"In asylum and withholding of deportation cases, we have consistently held that death threats alone can constitute persecution." *Ernesto Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000). Although it is true that "[o]ur court generally treats unfulfilled threats, without more, as within that category of conduct indicative of a

danger of future persecution, rather than as past persecution itself,” *Lim*, 224 F.3d at 936, here Salguero-Castro testified to threats “with more” – the threats were menacing and were combined with an (albeit unsuccessful) attempt by the military to shoot and kill Salguero-Castro.

As the majority notes, in *Gui v. INS*, we found past persecution when an applicant was first threatened and then survived a staged car crash. 280 F.3d 1217, 1229 (9th Cir. 2002). The reasoning in *Gui* supports a finding of past persecution here: “The fact that [Salguero-Castro] did not in fact die or suffer serious injury in [the shooting incident] should not mitigate the severity of the acts. Had he been maimed in the [shooting incident], persecution would be established easily.” *Gui*, 280 F.3d at 1229. *See also Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999)(holding that where petitioner testified that some of her cousins had been killed because they served in the military and that she had received two threatening notes, she had demonstrated past persecution); *Sangha v. INS*, 103F.3d 1482, 1487 (9th Cir. 1997)(finding that petitioner demonstrated past persecution as a result of the threats of violence and death he received from a terrorist group, but denying asylum for failure to satisfy on account of prong).

## II.

Salguero-Castro also testified credibly that he suffered this persecution on

account of an imputed political belief. *See Ernesto Navas*, 217 F.3d at 658. In both death threats, the army referred to him as a “guerilla.” *See id.* at 659 (explaining that an applicant can establish imputed political opinion “where the persecutors' conduct or statements show that they are imputing a particular opinion to their victim.”). Salguero-Castro testified to several interactions with the guerillas that would support the army’s belief that he was a guerilla or a guerilla supporter.

### III.

The fact that Salguero-Castro’s family is living unharmed in Guatemala, while relevant, is certainly not dispositive. “The fact that the [Salguero-Castro] family is safe does not refute his claims of persecution.” *Ceballos-Castillo v. INS*, 904 F.2d 519, 521 (9th Cir. 1990) (citation omitted). In *Lim*, we explained that ongoing family safety mitigates a well-founded fear when the family is similarly situated “and thus presumably subject to similar risk.” *Lim*, 224 F.3d at 935. Here, however, there is no evidence in the record that either of petitioner’s parents or his brother were ever accused of being guerillas by the military, recruited by the guerillas, compelled to attend a guerilla meeting, shot at by a military plane, or threatened with death by a military official. Indeed, the brother, who would presumably be most likely to be similarly situated, was a member of the

Guatemalan army. As in *Lim*, “nothing in the record supports an inference that their safety ensures that [petitioner] will be safe.” *Lim*, 224 F.3d at 935.

#### IV.

Showing past persecution is sufficient to create a presumption of a well-founded fear of persecution. *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998). However, the INS may defeat this presumption by demonstrating that conditions have changed in the country where the persecution took place, and so persecution is no longer likely. *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995); INA § 208.13(b)(1)(i)(A). Because the Supreme Court in *INS v. Ventura*, 123 S.Ct. 353 (2002), raised substantive objections to our interpretation of and reliance on the 1997 State Department’s Country Conditions Report on Guatemala to show a lack of change in country conditions, I would remand to the BIA for additional evidentiary findings on country conditions. The Court described the 1997 State Department Report as “at most, ambiguous” about whether country conditions had sufficiently changed. *Ventura*, 123 S.Ct. at 356. The Court also described contradictory statements in the Report as to the current state of conditions between the guerillas and the government and concluded that “remand could lead to the presentation of further evidence of current circumstances in Guatemala – evidence that may well prove enlightening given the five years that have elapsed since the

report was written.” *Id.* (citing 8 C.F.R. §§3.1, 3.2). In sum, I would grant the petition for review and remand to the BIA.